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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Market Entry and Regulation of	)	IB Docket No. 95-22
Foreign-affiliated Entities	)	RM-8355
	)	RM-8392

NOTICE OF PROPOSED RULEMAKING

Adopted: February 7, 1995 Released: February 17, 1995

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By the Commission: Commissioners Quello and Ness issuing separate statements.

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I. INTRODUCTION

1. This Notice of Proposed Rulemaking proposes new policies governing the participation of foreign carriers in the U.S. international telecommunications market. In this Notice, we set out three goals of our regulation of the U.S. international telecommunications market: (1) to promote effective competition in the global market for communications services; (2) to prevent anticompetitive conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their communications markets. We consider how to achieve these goals through implementation of Sections 214 and 310 of the Communications Act, as amended ("the Act"). We find that allowing foreign carrier entry into the U.S. international services market will further the public interest by providing additional competition that will benefit consumers. We tentatively conclude, however, that unrestricted foreign carrier facilities-based entry is not in the public interest when U.S. carriers do not have effective opportunities to compete in the provision of services and facilities in the foreign carrier's primary markets.

2. We propose to modify our public interest standard for considering foreign carrier applications under Section 214 of the Act to enter the U.S. market to provide international facilities-based services. We seek comment on requiring as an important element of our public interest standard a demonstration that effective market access is, or will soon be, available to U.S. carriers seeking to provide basic, international telecommunications facilities-based services in the primary markets served by the carrier desiring entry. We also would continue to consider other factors as part of our public interest analysis, such as national security, the openness of other telecommunications segments of the foreign carrier's primary markets, and the ability and incentives of the foreign carrier to discriminate against unaffiliated U.S. carriers.

3. In addition, this Notice proposes a specified level of foreign carrier ownership in a U.S. carrier at which the proposed entry standard would apply. We ask whether it is desirable to consider an applicant to be "affiliated" with a foreign carrier for purposes of our new rules when the foreign carrier acquires an ownership interest of a certain minimum level or a controlling interest at any level. We request comment on whether the minimum level of ownership should be set at greater than ten percent, twenty-five percent, or some other level of the capital stock of the applicant. This Notice also clarifies the definition of a facilities-based carrier.

4. Finally, this Notice asks whether the goals of this proceeding would be served by incorporating the proposed effective market access test as an element of the Section 310(b)(4) public interest analysis applicable to foreign entities seeking to acquire an indirect ownership interest of more than 25 percent in U.S. radio licensees. Thus, the Notice asks whether our evaluation of the public interest should consider whether the primary markets of the foreign entity offer effective market access to U.S. licensees to provide the same type of radio-based services as requested in the United States. We also seek comment on other public interest factors we should consider.

5. We seek public comment on whether these proposals are administratively feasible and whether these approaches or other alternatives will best serve our goals.

II. BACKGROUND

A. Petitions for Rulemaking

1. AT&T's Petition

6. AT&T filed a petition for rulemaking on September 22, 1993, requesting that the Commission institute a rulemaking to: (1) comprehensively review the issues arising from foreign carrier participation in the U.S. telecommunications market; and (2) promulgate rules that address "the current regulatory dichotomy between the United States and foreign countries."[1] AT&T states that the international telecommunications industry is changing from a bilateral services model to a global market, where customers are demanding "seamless" international networks. It argues that U.S. carriers must obtain comparable market access abroad to compete effectively in the provision of basic interexchange and international services. Likewise, it says, foreign carriers wishing to become global are compelled to gain entry to the U.S. market in some manner. According to AT&T, the traditional regulatory concern about "whipsawing" has been

[1] FCC File No. RM-8355.

overshadowed by the possibility that a foreign monopoly carrier now may be in a position to provide service originating or terminating in the United States and its home country, whereas U.S. competing carriers would not.

7. First, AT&T proposes that, before approving foreign carrier entry into the United States, the Commission should make a finding as to whether comparable opportunities for U.S. carriers to compete in the home markets of the prospective entrants presently are available or will be available within a reasonable period not to exceed two years.[2] Second, AT&T states that the Commission should condition any authorization for entry in the U.S. services market by foreign carriers having the ability to discriminate among U.S. carriers in their home markets on the agreement by the foreign carrier to nonstructural safeguards to minimize the opportunity for such discrimination. AT&T states that, at a minimum, the Commission should require: (1) no exclusive arrangements for the provision of basic or enhanced services; (2) proportionate return of foreign-billed traffic; (3) cost-based accounting rates within 30 days; (4) consent of originating and terminating carriers to refile U.S. originating or terminating traffic; (5) interconnection or distribution arrangements in the foreign country that are available to all U.S. carriers; (6) no special concessions certification; and (7) information received from other U.S. carriers to be protected and not used for the benefit of itself or its U.S. affiliate.

8. Several comments were filed in response to AT&T's petition.[3] Only Sprint supports AT&T's petition. The majority

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[2] AT&T states that a successful comparable market access showing should include the following elements: 1) U.S. carriers can offer substantially similar services under similar conditions in the foreign country as can be offered in the United States; 2) existence of safeguards to prevent cross-subsidization between the monopoly and competitive market segments; 3) equal access available; 4) availability of published, non-discriminatory tariffs for interconnection in the foreign country; 5) portability of telephone numbers; 6) timely and non-discriminatory disclosure of network information; 7) protection of carrier and customer proprietary information; and 8) effective competition actually exists.

[3] Supporting comments were filed by Sprint Communications Co. L.P. (Sprint). The parties expressing some form of opposition to AT&T's petition are ACC Global Corp. (ACC), the British Embassy, British Telecommunications plc (BT), Cable & Wireless, Inc. (C&W), DOMTEL Communications, Inc. (DOMTEL), EMI Communications Corp. (EMI), ENTEL International B.V.I. Corp. (ENTEL-Chile), IDB Communications Group, Inc. (IDB), Teleglobe

of the commenters oppose AT&T's petition, arguing generally that AT&T's proposed rules would require "mirror reciprocity," which the opponents claim would be unrealistic given the varied telecommunications systems. They also argue that existing safeguards, especially those contained in the 1992 International Services Order[4] and the TLD Order[5] are sufficient to protect competition in the U.S. international and interexchange marketplace.[6] They support the Commission's policy of deciding market entry questions on a case-by-case basis, so as to take into consideration specific circumstances in each case.[7]

2. IDB's Petition

9. Issues related to AT&T's petition also were raised in a petition for rulemaking filed by IDB on October 29, 1993.[8] In this petition, IDB asks the Commission to adopt a uniform definition of a facilities-based carrier for purposes of Commission rules and policies governing international common carriers. IDB states that a uniform definition is important to provide carriers with certainty regarding their reporting obligations and their ability to interconnect international private lines to the U.S. public switched network. IDB proposes that we regulate a carrier as a facilities-based carrier when it obtains the maximum interest in the underlying facility permitted by law. AT&T filed comments against IDB's petition, saying there is a clear definition which need not be changed. MFS International, Inc. (MFS) supports IDB's petition. Because the issues involved in adopting such a definition directly relate to how we regulate U.S. international carriers, we will address IDB's petition in this rulemaking.

Inc. (Teleglobe), Telefonica Larga Distancia de Puerto Rico, Inc. (TLD), Coalition of International Communications Users (International Telecom Users), MCI Telecommunications Corp. (MCI), and Motor-Columbus AG (Motor-Columbus).

[4] Regulation of International Common Carrier Services, 7 FCC Rcd 7331 (1992)(International Services).

[5] Telefonica Larga Distancia de Puerto Rico, 8 FCC Rcd 106, 111-113 (1992)(TLD Order).

[6] See MCI Comments at 5; TLD Comments at 5-6; C&W Comments at 6-7, 9-11, 13; ENTEL-Chile Comments at 2-3, 8-9; IDB Comments at 4-5.

[7] See ENTEL-Chile Comments at 7, and ACC Comments at 2-3.

[8] FCC File No. RM-8392.

B. Existing Policy Under Section 214

10. We currently examine applications filed by foreign carriers or their U.S. affiliates (collectively "foreign carriers") for international Section 214 authority on a case-by-case basis. We balance our policy in favor of open market entry against the potential for undue discrimination by the foreign parent against unaffiliated U.S. carriers. Under this policy, we have authorized foreign carriers to resell international switched services,[9] non-interconnected private line services, and private line services interconnected to the public switched network ("PSN") upon a determination that the foreign country on the other end of the circuit provides equivalent opportunities to U.S. carriers to resell interconnected private lines.[10] In addition, we recently authorized several foreign carriers to acquire U.S. international facilities subject to safeguards to protect U.S. carriers providing international service from discrimination.[11]

11. In recent years, we have addressed the issues raised by foreign carrier market entry in several significant cases. In 1991, we authorized Atlantic Tele-Network, Inc. (ATN), a 100 percent U.S.-owned carrier, to provide facilities-based switched service to Guyana, even though ATN indirectly controlled the monopoly service provider in Guyana.[12] To protect against potential discrimination that could arise on the U.S.-Guyana route by virtue of ATN's bottleneck control over Guyana's telecommunications infrastructure, we imposed on ATN the same conditions then placed on international common carriers classified as dominant, foreign-owned carriers, as well as other nondiscrimination safeguards.

12. A year later, we approved the acquisition of Telefonica Larga Distancia de Puerto Rico (TLD), a U.S. domestic and

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[9] See, e.g., Cable & Wireless Communications, Inc., 7 FCC Rcd 6855 (Int. Fac. Div. 1992); BT North America Inc., DA 94-1257, International Bureau, rel. Nov. 14, 1994.

[10] See, e.g., Cable & Wireless, Inc., DA-1344, Tele. Div., rel. Dec. 8, 1994; Cable & Wireless, Inc., DA 94-1227, Tele. Div., rel. Nov. 2, 1994; Cable & Wireless, Inc., 8 FCC Rcd 1664 (Com. Car. Bur. 1993); fONOROLA Corporation and EMI Corporation, 7 FCC Rcd 7312 (1992), Order on Recon., 9 FCC Rcd 4066 (1994).

[11] See infra paras. 12-14.

[12] Atlantic Tele-Network, Inc., 6 FCC Rcd 6529 (1991), appl. for review denied, 8 FCC Rcd 4776 (1993), appeal pending sub nom. Atlantic Tele-Network, Inc. v. FCC, U.S. Court of Appeals, D.C. Circuit, No. 93-1616.

international long distance carrier, by Telefonica de Espana (Telefonica), the government-controlled monopoly carrier of Spain.[13] Because TLD would be controlled by the Spanish telecommunications administration, which exercised bottleneck control over Spain's telecommunications infrastructure, we imposed regulatory safeguards to prevent TLD from acting in concert with Telefonica or other foreign carriers to discriminate against U.S. carriers in the terms and conditions of access to foreign markets for the origination and termination of U.S. international traffic. We noted that, in this particular instance, the potential for anticompetitive harm to U.S. carriers was mitigated by the fact that the applications involved a limited number of circuits; traffic would originate only from Puerto Rico and the U.S. Virgin Islands; and no interconnected private line service would be involved. We also considered the benefit to the Puerto Rico government of the capital generated by the privatization of TLD. However, we said that, with respect to future facilities-based applications from TLD (or any carrier affiliated with a foreign carrier), we would assess whether the authority sought posed an additional risk of anticompetitive behavior, and, if so, whether regulatory safeguards would be sufficient to protect against it.

13. In June 1994, we authorized ENTEL-Chile, a Chilean long distance carrier, to acquire the U.S. carrier AmericaTel.[14] We found that: (1) Chile's market for domestic long distance and international services was increasingly competitive and open to U.S. investment and participation; (2) Chile has increasingly liberalized its telecommunication laws and regulations aimed at promoting competition and preventing discrimination against U.S. and other foreign carriers; and (3) the nondiscrimination safeguards available under Chile's regulatory regime and the safeguards we imposed as a condition of authorization would be sufficient to protect U.S. carriers in their provision of international service between the United States and Chile. We required AmericaTel to submit annual progress reports detailing the status of the telecommunications industry and regulatory regime in Chile and reserved the right to review the terms and conditions of the authorization in the event that the safeguards imposed in the order or by virtue of Chilean regulation failed to sustain competition on the U.S.-Chile route.

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[13] TLD Order, 8 FCC Rcd 106.

[14] AmericaTel Corporation, 9 FCC Rcd 3993 (1994)(AmericaTel Order). At the time of the AmericaTel Order, Telefonica indirectly owned 20 percent of ENTEL-Chile. Telefonica has since divested its interest. See Letter from Raul R. Rodriguez, Counsel to AmericaTel Corporation, to William F. Caton, Acting Secretary, FCC, dated October 31, 1994.

14. Shortly thereafter, we reviewed the British Telecommunications plc (BT) acquisition of a non-controlling interest in MCI as part of a global alliance to provide services to customers worldwide.[15] We found that the terms of the investment did not result in a transfer of control to BT requiring prior FCC approval and that BT's 20 percent investment in MCI, even when combined with other foreign ownership for a total of up to 28 percent foreign ownership in MCI, was permissible under Section 310(b)(4) of the Communications Act. Additionally, we found that MCI's commitments to accept no special concessions and to maintain certain provisioning and maintenance records, combined with the reporting requirements we imposed, adequately protected against the potential for BT to leverage its dominant position in the U.K. telecommunications market to discriminate in favor of MCI over competing U.S. carriers. In so deciding, we took into account the United Kingdom's relatively liberal regulatory regime and the existence of competition in the U.K. domestic telecommunications market.

C. Existing Policy Under Section 310

15. Section 310(b)(4) establishes benchmarks applicable to foreign entities seeking to acquire an ownership interest in the parent company of a U.S. radio licensee. Specifically, Section 310(b)(4) imposes the following benchmarks: 25 percent foreign ownership, 25 percent foreign directors, and no foreign officers. Currently, the Commission examines requests to exceed the Section 310(b)(4) benchmarks on a case-by-case basis, and has generally considered the following factors: national security, the extent of alien participation in the parent holding company, and the nature of the license, including whether the licensee exercises control over content. In addition, the Commission may consider any other public interest factors appropriate.

16. One of Congress' principal reasons for enacting Section 310 of the Communications Act of 1934 was its concern for national security and preventing alien activities against the government during a time of war.[16] Accordingly, the Commission

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[15] BT/MCI Declaratory Ruling, 9 FCC Rcd 3960 (1994)(BT/MCI Order).

[16] See generally S. Rep. No. 781, 73d Cong., 2d Sess. 7 (1934). See also Moving Phones Partnership L.P. v. FCC, 998 F.2d 1051, 1055-56 (D.C. Cir. 1993)(referring to "national security policy underlying section 310(b)" and indicating that "the rationale is equally applicable to common carrier radio stations, as they, also, are a part of the nation's communications network"). The original national security rationale for limiting foreign ownership in a parent corporation has less applicability today than it had in the 1930's. Today there is a plethora of

has traditionally sought to ascertain whether a country with which a prospective licensee or its parent is associated enjoys "close and friendly relations with the United States" and, therefore, is not a "national security concern."[17]

17. The Commission has also traditionally considered the extent of alien participation in the parent corporation of a Title III radio licensee. More specifically, the Commission has considered where the parent corporation is incorporated (the United States or elsewhere); the citizenship of the stockholders, officers and directors of the parent corporation; and whether there are intermediate corporations between the licensee and the parent corporation that are incorporated in the United States, are owned by U.S. citizens or interests, and have U.S. officers and directors.[18]

18. In addition, the Commission has traditionally considered the type of radio license at issue in assessing whether the public interest would be disserved by foreign ownership in a parent corporation exceeding the Section 310(b)(4) benchmarks. For example, the Commission has concluded that concern about the effect of foreign ownership on national security is lessened when common carrier radio licenses are involved because they are "passive" in nature and the licenses confer no control over the content of transmissions.[19]

19. Finally, the Commission may also consider other relevant factors, including the furtherance of established Commission policies such as increased competition or the wide

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service providers. No single licensee which is owned in part by a foreign corporation could take over the wireless or wireline services in the United States in a time of war.

[17] See, e.g., GRC Cablevision, Inc., 47 FCC2d 467, 468 (1974) ("We note . . . that the non-citizens are from a country [Canada] that has traditionally had close and friendly relations with the United States . . . .").

[18] See, e.g., BT/MCI Order, 9 FCC Rcd at 3964, para. 22 (1994).

[19] BT/MCI Order, 9 FCC Rcd at 3964, para. 23; Teleport Transmission Holdings, Inc., 8 FCC Rcd 3063 (Com. Car. Bur. 1993); IDB Communications Group, Inc., 6 FCC Rcd 4652, 4653 (Com. Car. Bur. 1991); Data General Corporation and Digicom, Inc., 2 FCC Rcd 6060 (Dom. Fac. Div. 1987).

dissemination of licenses.[20]

III. DISCUSSION

20. The focus of telecommunications service providers has become increasingly global over the last several years, reflecting the increasingly global nature of the economy. The United States has become the most vital market for shaping world competition -- over 20 percent of all international communications services involve the United States.[21] Most of the major U.S. corporations are now multinational. Over 40 percent of the world's multinational corporations are headquartered in the United States.[22] These commercial customers prefer one-stop shopping to satisfy their varied and specialized communications needs. In addition, the many Americans who travel internationally, or have family or friends in other countries, have an interest in efficient, affordable global telecommunications. International telecommunications service offerings increasingly involve provision of an "end-to-end" package of services, including domestic (in two or more countries) and traditional international services. Both U.S. and foreign telecommunications service providers are developing strategies to serve their customers' needs through alliances with other service providers and entry into foreign international and domestic markets.

21. Our procompetitive U.S. regulatory policy has permitted a number of foreign carriers to enter the U.S. international and domestic services market to meet customer demands. Many other countries permit various forms of entry into their markets by foreign-based carriers, including many U.S. telecommunications providers. When such entry has been accompanied by regulatory liberalization, countries allowing entry already are experiencing the benefits of competition. We believe both the carriers and the consumers of those countries with liberalized entry policies should receive the benefits of having their carriers compete in the lucrative U.S. market.

22. But many important foreign communications services and facilities markets or market segments remain closed to U.S.

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[20] See, e.g., Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 2348, 2349, para. 4 (1994) (In which Commission announced policy of promoting competition among a diverse group of service providers).

[21] See ITU Direction of Traffic: International Telephone Traffic, 1994, p.7, Table 2.2; TeleGeography 1, 85 (G. Staple ed. 1993).

[22] Telecommunications Reports, Oct. 10, 1994, at 17.

competition, even while entities from those markets have entered or seek to enter similar U.S. markets.[23] As detailed below, asymmetric market access is detrimental to both U.S. service providers and U.S. consumers. Closed foreign markets preserve the market power of foreign entities in their home markets and closed markets may inhibit competition in the provision of global communications services.[24]

23. Under these circumstances, current policies based on the traditional correspondent services model[25] may not adequately address questions of market access, undue discrimination and potential anticompetitive effects that arise in today's evolving telecommunications markets, where carriers seek entry on both ends of international circuits. Further, our case-by-case review of foreign carrier applications has caused uncertainty in the market due to the lack of a clear standard for evaluating applications by foreign carriers with different degrees of market power in their home markets. Moreover, there is a risk that case-by-case determinations of the public interest may inadvertently underemphasize the general global interest of the United States in promoting a competitive world market.

24. In addition, our current approach to considering foreign entry into U.S. radio-based telecommunications and broadcast markets through application of Section 310(b)(4) may not be the most effective means of promoting global competition in these areas. It may be that our decisions in public interest determinations under Section 310(b)(4) should more directly consider how the decision will influence the development of a competitive market for international communications services.

25. We believe a rulemaking proceeding would help the Commission to articulate standards to provide more coherent principles to guide its deliberations concerning individual cases. A formal rulemaking also would give foreign entities more certainty when making investment decisions, and provide an

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[23] For instance, in 1993 the Office of Technology Assessment concluded that 85 percent of the European Union's ("E.U.'s") telecommunications services market remained closed to foreign entities. In the Asia-Pacific region, most countries, including South Korea, Singapore, Malaysia, China, and Japan maintain a monopoly in basic local voice services.

[24] See infra paras. 28-29.

[25] In a traditional correspondent services arrangement, a U.S. carrier enters into an operating agreement with an unaffiliated foreign carrier under which the two companies agree to jointly own and operate international facilities and terminate each other's telecommunications traffic.

incentive for foreign administrations with currently closed markets to consider opening their markets.

A. Commission Goals

26. We have three basic goals in this rulemaking:

1. To promote effective competition in the global market for communications services.

2. To prevent anticompetitive conduct in the provision of international services or facilities.

3. To encourage foreign governments to open their communications markets.

27. The promotion of effective competition in the global market is our primary goal. Such competition will achieve for U.S. consumers reduced rates, increased quality, and new innovative services, including the availability of global communications services. Thus, through this rulemaking, we intend to promote the opportunity for U.S. consumers to choose among multiple suppliers based on innovative offerings, service quality and efficiencies, and price competitiveness. As explained below, the other two goals are necessary to reach this first goal.

28. A necessary step towards obtaining effective competition is the prevention of anticompetitive conduct in the provision of international services or facilities. In a truly competitive global market, entry of foreign carriers into the U.S. international market would be procompetitive. However, because global competition remains highly asymmetric, unrestricted entry by foreign carriers from closed markets into the open U.S. market has the potential to inhibit competition, particularly with respect to the provision of global communications services to high-end users such as multinational companies. For instance, a foreign carrier would be able to acquire 1+ access to U.S. consumers and hold itself out as a ubiquitous provider of U.S. international services while U.S. carriers could not make the same representations in the foreign carrier's home market. In addition, such a carrier would be able to offer its customers benefits such as lower costs and faster provisioning of services provided between its closed markets and the United States.

29. Such conduct by foreign carriers may have anticompetitive effects for several reasons. First, it preserves and maintains a monopoly in the foreign carrier's home market. Second, it allows the foreign entity to use that monopoly to gain a competitive advantage in other markets that are, or could be, competitive, including communications between its foreign home market and the United States, communications in the United

States, and global network services. The foreign competitor has a competitive advantage, and will therefore win customers, not because of its superior business acumen, responsiveness to customers, or technological innovation, but because of its protected status in its home market. The possession of such unmeritorious advantages is a disservice to consumers in all these markets because, in the absence of full competition on the merits by all competitors, consumers do not receive reduced rates, increased quality, and innovation.

30. In general, the potential for exploitation of a foreign carrier's market power is decreased by: (1) access to facilities at both ends of the international connection for all U.S. carriers; and (2) effective competitive safeguards (including interconnection rules) enforced by an appropriate regulatory authority at both ends. Our decision in AmericaTel shows our willingness to accept foreign carrier entry if these two conditions are met. If, however, the foreign carrier is not subject to facilities competition and competitive safeguards, its affiliation with a U.S. carrier or entry into the U.S. market may raise serious competitive questions.

31. Therefore, another key to global competition is foreign market liberalization. It is unlikely competition could thrive if a particular market keeps out some of its most effective global competitors. The demand for seamless global services by business means that U.S. carriers serving the other country must be able to originate traffic from their customers in that country to other markets around the world. Encouraging global competition further means that there needs to be international facilities-based competition on the U.S. and foreign ends of an international route. Open markets permit U.S. carriers to respond to foreign carriers in relevant markets, allowing U.S. carriers to be healthier competitors both at home and abroad. For example, U.S. wireless service providers' participation in foreign countries' cellular markets has strengthened both U.S. and foreign competitors and has resulted in improved service to both foreign and U.S. consumers. Closed markets frustrate all these public interest benefits.

32. Access to the U.S. market through international Section 214 authorizations or Title III licenses may be an appropriate tool to achieve the benefits of competition such as low prices, high quality, and innovation. The benefits U.S. companies would receive by having an outlet for their capital, technology and expertise would be balanced by the same benefits flowing to their foreign counterparts through entry into the U.S. market. Also, access to the U.S. market, as a uniform standard, could be administratively more efficient and less of a burden on the Commission's resources than the drafting of multiple sets of conditions to fit the particular attributes of each foreign market on a case-by-case basis.

33. Therefore, we propose the addition of an effective market entry standard to our public interest analysis of foreign carrier entry applications under Section 214 as a tool to encourage foreign administrations to open their markets to U.S. entities. This, in turn, will eliminate opportunities for foreign entities to engage in conduct that might have anticompetitive effects in the provision of international services or facilities, including undue discrimination or other abuses of bottleneck facilities, and will promote effective global market competition. We also request comment on whether our goals in this proceeding will be furthered by incorporating the effective market access test as an element of our Section 310(b)(4) analysis for Title III common carrier, aeronautical and broadcast license applications.

34. Whatever entry standard we adopt in this proceeding for international Section 214 authorizations will not be an end in itself. It will only be an interim step designed to further the goal of effective competition in the global communications market. Therefore, we expect that, as the trend of liberalization and privatization continues around the world, and more countries permit facilities-based competition for voice and other services, the need for such entry standards will diminish.

B. Section 214 Standard For Entry By Foreign Carriers

1. International Facilities-based Entry By Foreign Carriers

a. Regulated Open Entry Under Section 214

35. Currently our rules do not prohibit foreign-owned or affiliated carriers from acquiring and operating international switched and private line facilities on a common carrier basis in the United States. We have permitted some services by foreign carriers on international routes, including routes where the applicant is affiliated with a foreign carrier. Prior to authorizing entry, we have reviewed the potential effects on competition in the U.S. market. If necessary, we have imposed safeguards to prevent undue discrimination and unfair competition.[26] In our recent facilities-based authorizations to foreign carriers, we found that our nondiscrimination safeguards were sufficient in part either because of the competition and regulation that existed in the foreign carriers' home market, or because the authority granted was limited in scope.

36. We have followed this course to encourage competition

[26] See TLD Order, 8 FCC Rcd at 109-113.

in the U.S. international services market.[27] Some have questioned, however, whether the benefits of such competition are undermined when new entrants are able to succeed because of privileged access to closed foreign markets.

37. Our experience leads us to believe that an open entry policy, without explicit standards, may not provide sufficient incentive for foreign markets to open. In addition, in light of demands by multinational firms for end-to-end telecommunications services and "one-stop shopping," safeguards may not compensate for the disadvantages U.S. carriers face when competing against a foreign carrier that operates in both the United States and closed foreign markets. The competitive strengths and abilities of individual service providers -- rather than the regulatory structure of markets -- should determine the success of service providers in the global telecommunications market.[28]

b. Effective Market Access

38. We tentatively conclude that we should modify our entry standard for international facilities-based carriers to encourage the formation of a competitive global market. We believe that our standard should permit entry into the U.S. international facilities-based services market by foreign-affiliated carriers where the foreign carriers' markets are open to U.S. carriers. Therefore, we believe that an important element of our proposed public interest test should be effective market access for U.S. carriers in the primary international telecommunications markets served by the carrier desiring entry. This access must exist at the time of entry, or in the near future. We also will consider other factors which we have previously applied under our public interest analysis such as national security; the openness of other telecommunications segments of the foreign carrier's primary market; and the ability and incentive of the foreign carrier to discriminate against unaffiliated U.S. carriers.

39. Initially, we request comment on the scope of this Commission's statutory jurisdiction to consider the availability of effective market access to foreign markets as one factor in

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[27] See TLD Order, 8 FCC Rcd at 108. See also Regulatory Policies and International Telecommunications, CC Docket No. 86-494, Report and Order and Supplemental Notice of Inquiry, 4 FCC Rcd 7387, 7428 (1988)(citing Notice of Inquiry and Proposed Rulemaking, 2 FCC Rcd 1022, 1025 (1987)). See also FTC Communications, Inc., 2 FCC Rcd 6114 (1987) (granting switched service facilities-based authorization to U.S. carrier 14.9 percent of which is owned by company held indirectly by the French government).

[28] See AmericaTel, 9 FCC Rcd at 3996, para. 14.

our public interest analyses under Sections 214 and 310(b)(4) of the Act. Under our authority to regulate foreign commerce in communication by wire and radio,[29] we have examined the degree of market openness for the purpose of ensuring the efficacy of our competition safeguards.[30] In order to ensure compliance with our International Settlements Policy, we have also examined the openness of other markets to determine whether equivalent international private line resale opportunities exist.[31] In this Notice, we seek comment on the scope of our jurisdiction to consider the openness of foreign markets to further the three goals described in Section III.A.

40. We propose to define effective market access as the ability for U.S. carriers, either currently or in the near future, to provide basic, international telecommunications facilities-based services in the primary markets served by the foreign carrier seeking entry. A primary market is one where a carrier has a significant facilities-based presence.[32] We would consider the following factors, none of which would be dispositive, to determine whether effective market access exists: (1) whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those the foreign carrier seeks to offer in the United States; (2) whether competitive safeguards exist in the foreign country to protect against anticompetitive and discriminatory practices, including costallocation rules to prevent cross-subsidization; (3) the availability of published, nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services; (4) timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities; (5) the protection of carrier and customer proprietary information; and (6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards. In considering these indicators to determine whether effective market access exists, we will not necessarily require that each factor be present in order to make a favorable finding, particularly if there is evidence that the market is fully competitive. Rather, we will look to the arguments of the applicant and commenting

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[29] See Section 1 of the Communications Act of 1934, 47 U.S.C. §151.

[30] See AmericaTel Order, 9 FCC Rcd at 3997-4001; BT/MCI Order, 9 FCC Rcd at 3969.

[31] See ACC Global Corporation, 9 FCC Rcd 6240 (1994); fONOROLA and EMI, 7 FCC Rcd at 7312.

[32] See para. 43, infra.

parties as to the appropriate weight of each factor in a particular market.

41. We do not propose to adopt AT&T's "comparable market access" standard as a method of regulating entry. AT&T would require the Commission to find that competitive opportunities essentially identical to those in the United States are available to U.S. carriers in the home markets of the prospective entrants. Given the varying market and regulatory conditions around the world, it would be impossible to find a situation where essentially identical market access exists. The AT&T test would require that the regulations and market structure of the foreign country mimic those of the United States. Such a strict test would be impossible to meet, and thus would not encourage open markets. We also believe that there are times when public interest factors other than comparable market access might be decisive on the issue of entry. For example, if comparable market access exists for international facilities-based services in a particular country, but all other telecommunications markets are closed to U.S. carriers, the balance of the public interest factors may weigh against granting entry to a carrier from that country. While market entry is an important part of the public interest analysis, we do not share AT&T's view that comparable market access <u>must</u> exist before foreign carrier entry is allowed.

42. We also do not believe it necessary to adopt AT&T's request for cost-based accounting rates as a condition of foreign carrier entry. AT&T proposes that as a prerequisite to entry the foreign carrier should agree that it will within thirty days reduce accounting rates for all U.S. carriers to the lesser of either cost-based levels, or the lowest rate charged by the foreign carrier to other telecommunications entities from any other country. This requirement should not be necessary because we expect accounting rates to drop as a natural consequence of the introduction of effective market access. We propose, however, that the presence of cost-based accounting rates be part of our total public interest analysis to determine whether facilities-based market entry should be allowed.

43. We request comment on the following approach for applying the effective market access element of the public interest test. If a foreign carrier desires to enter the U.S basic international facilities-based market either directly or through affiliation[33] with an authorized U.S. carrier, we would assess whether the primary market, or markets, of the carrier offers effective opportunities to U.S. carriers to compete in the provision of basic, international services and facilities. We recognize that a foreign carrier might operate in several

[33] <u>See</u> <u>infra</u> Section III.B.2.a. for a discussion of the definition of "affiliation."

geographic markets. Therefore, for this part of the test we will only look at primary markets: those key markets where the carrier has a significant ownership interest in a facilities-based telecommunications entity that has a substantial or dominant market share of either the international or local termination telecommunications market of the country, and traffic flows between the United States and that country are significant. A carrier's secondary market would be defined as a market in which it has an ownership interest in a facilities-based carrier, but is not a substantial or dominant carrier, or where insignificant traffic flows exist between the United States and that country.

44. Under this approach, if a U.S. carrier can compete as a facilities-based provider of international basic services in the primary market(s) of the carrier seeking entry, we would find that the carrier has met the effective market access element of our public interest standard. Where a foreign carrier's primary markets are open, even if secondary markets closed, we would find that the market access element has been met.

45. Once we have reviewed the effective market access element of our public interest analysis, we would assess other public interest factors which might weigh in favor of, or against, allowing entry into the U.S. market. Such factors could include the state of liberalization in the foreign carrier's domestic market and the availability of other market access opportunities to U.S. carriers; the status of the foreign carrier as a government or non-government entity; the general significance of the proposed entry to promotion of competition in global markets; the presence of cost-based accounting rates; and any national security implications. Finally, we would solicit the views of the Executive Branch on the proposed foreign carrier's entry into the U.S. market.

46. We believe the above approach would be the most effective way to promote both global competition and competition in the provision of U.S. international services, with their associated benefits for users. This approach would, in most cases, limit facilities-based competition by new foreign carrier entrants to those cases that affirmatively promote global competition and encourage the opening of foreign markets. We believe that, in the long run, this approach should result in stronger, more equal competition both in the United States, and abroad, because carriers would not have marketing and provisioning advantages resulting from operating both in closed foreign home markets and in the United States.

47. We also believe this approach addresses our goal of removing opportunities for undue discrimination and other conduct that might have an adverse effect on competition. Linking facilities-based entry to effective market access is the surest means of preventing anticompetitive conduct by a foreign carrier.

If other public interest factors weigh in favor of allowing entry, safeguards such as dominant carrier regulation can still be imposed to guard against undue discrimination and anticompetitive conduct.

48. Further, we believe this approach would be the best method of furthering our goal of encouraging foreign governments to liberalize their telecommunications markets. In this respect, two views were presented in response to AT&T's proposed "comparable market access" test. AT&T contends that foreign governments have no incentive to liberalize if the United States does so unilaterally. AT&T argues that these governments might liberalize if given an incentive, i.e., access to the U.S. market by their carriers. On the other hand, several other carriers have argued that, if the U.S. government increases restrictions on U.S. market access, other governments might retaliate with increased restrictions as well.

49. We believe that our proposed public interest standard addresses both AT&T's concern about providing incentives to open, and the other carriers' concerns about inviting retaliation. By having effective market access as the first element of our public interest standard, we are emphasizing that we will recognize and reward carriers from those markets that are liberalizing. At the same time, we are trying to avoid sending a signal that might be misinterpreted as a closing of our markets. Indeed, this proposed approach, unlike AT&T's, purposely does not require "mirror reciprocity" for this reason. We maintain flexibility under this approach to look at all of the public interest factors surrounding entry, and balance the market conditions of the primary markets to see what opportunities are present for U.S. carriers to compete there.[34] Even if a foreign carrier cannot demonstrate that effective market access exists for U.S. carriers in its primary markets, it may still show that other public interest factors warrant its entry into the U.S. market. Thus, we believe the advantages of this flexible approach would offset any disadvantages that might occur by not allowing immediate facilities-based entry by all foreign carriers. Furthermore, we believe this flexible approach will promote the objectives of the Administration's Global Information Infrastructure (GII)

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[34] For example, the Commission traditionally has not been concerned with content-related issues in authorizing the provision of U.S. international common carrier services. These issues, however, may warrant consideration in our international Section 214 public interest analysis as common carriers seek to enter national and global markets for video and audio programming as well as video and audio transmission.

initiative[35] by encouraging competition.

c. Other Matters

50. We do not believe that our goals would be furthered by requiring an effective market access showing when a U.S. carrier acquires an ownership interest in a foreign carrier. If, however, the foreign carrier acquired by the U.S. carrier is a monopoly, or otherwise warrants dominant carrier treatment under Section 63.10 of our rules, we would regulate the U.S. carrier in the same manner as if the foreign carrier itself had entered the U.S. market. That is, we would apply our dominant carrier and other nondiscrimination safeguards to the U.S. carrier in its provision of U.S. international services.[36]

51. Finally, we propose to implement whatever approach we ultimately adopt in this proceeding through the Section 63.01 application process and the Section 63.11 notification process. Section 63.11 of the rules requires carriers to notify the Commission within ninety days of the acquisition of an "affiliation"[37] with a foreign carrier. We would continue to place these notifications on public notice. We propose, however, to change the notification period specified in Section 63.11 from ninety (90) days to thirty (30) days. In addition to using the notification to determine whether a change in regulatory status may be warranted under Section 63.10, we would also use the notification to determine whether further review of the facts surrounding the acquisition is warranted, and, if so, whether the carrier's Section 214 certificates should be designated for hearing. The carrier also would have the option, prior to the acquisition, of seeking a declaratory ruling that such acquisition serves the public interest, convenience and necessity.

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[35] See Vice President Al Gore, Speech at World Telecommunications Development Conference (Mar. 22, 1994)(transcript available at the Federal Communications Commission). One of the goals outlined by the Vice President in his speech before the World Telecommunications Development Conference was to encourage competition as a means of increasing innovation, reliable service, and economic growth. Vice President Gore also emphasized the importance of a flexible, effective regulatory framework that can help ensure the continued openness of the more liberal foreign telecommunications markets, and promote the opening of closed foreign telecommunications markets to competitive entry.

[36] See infra Section III.C.

[37] See infra Section III.B.2.a. for proposed new definition of "affiliation."

2. Definition of Affiliation

a. Affiliation for Purposes of Entry Authorization

52. We propose to apply any entry standard adopted in this rulemaking for international Section 214 applications only to those potential entrants that are "affiliated" with a "foreign carrier."[38] We tentatively conclude that it is not necessary to include within the scope of this rulemaking those potential entrants with foreign owners that do not fall within the definition of a foreign carrier. This is in contrast to Section 310(b) of the Act, which applies to ownership by any foreign entity. We believe that limiting the scope of this rulemaking to foreign carriers should promote development of effective global competition by providing national and global carriers with the flexibility they need to structure their businesses and raise capital from foreign sources other than foreign carriers,[39] while controlling the potential for abuse of market power by certain foreign carriers. We request comment on this approach, particularly about whether it adequately encourages more open markets abroad.

53. In conjunction with its request that we adopt a comparable market access standard, AT&T argues that we should change our definition of affiliation from a control standard to one that treats a U.S. carrier as an affiliate of a foreign carrier when the foreign carrier owns five percent or more of the

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[38] We propose to define "foreign carrier" as we have defined it in Section 63.01(r)(1)(ii) of the rules: "... any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations, see Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art. 1." We construe this definition of a foreign carrier as we did in International Services. Thus, it includes foreign carriers that provide intercity or local access services or facilities in a foreign country. International Services, 7 FCC Rcd at 7334 n.47.

[39] We also ask infra in Section III.D. whether we should adopt a liberalized application of Section 310(b)(4), as it applies to licensing U.S. common carrier, broadcast and aeronautical radio facilities, which will permit us to recognize foreign countries' efforts to liberalize their telecommunications markets. We note, however, that our discussion regarding identifying foreign carrier affiliations for purposes of authorizing entry under Section 214 is irrelevant for purposes of applying Section 310(b)(4), which is governed by statute.

U.S. carrier.[40] One reason to revise our affiliation standard is that it may not address many of the ways in which foreign carriers seek to serve the U.S. international telecommunications market. For instance, there have been direct acquisitions of U.S. carriers, such as TLD and AmericaTel, joint ventures involving less-than-controlling ownership interests in U.S. carriers, such as the BT/MCI venture, and co-marketing arrangements such as AT&T's WorldPartners Company.

54. We note that, in the International Services proceeding, the Department of Justice (DOJ) commented that a less-than-controlling interest by a foreign carrier in a U.S. carrier could give the foreign carrier the financial incentive to favor its U.S. affiliate. Indeed, DOJ recently alleged in its Complaint in U.S. v. MCI Communications Corporation and BT Forty-Eight Company (NEWCO),[41] that the acquisition of 20 percent of MCI shares by BT may substantially lessen competition in the provision of international telecommunications services between the United States and the United Kingdom.[42] DOJ was particularly concerned with the territorial allocation provision and loss of rights provisions entered into between BT and MCI that would force BT to rely upon its 20 percent investment in MCI as a primary source of revenues from the U.S. telecommunications market.[43]

55. In our Declaratory Ruling regarding the BT/MCI venture, we also found that a less-than-controlling interest could be a source of concern.[44] Thus, in spite of the fact that MCI and BT

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[40] For a more detailed discussion of our current definition of affiliate, see infra para. 65.

[41] U.S. v. MCI Communications Corporation and BT Forty-Eight Company (NEWCO), Case No. 1:94 CV01317 (D.D.C. filed June 15, 1994)(hereinafter cited as U.S. v. MCI). DOJ and the defendants (MCI and NEWCO) stipulated to an entry of a Final Judgment.

[42] See DOJ Competitive Impact Statement filed June 15, 1994 in U.S. v. MCI at 10.

[43] See id. at 11.

[44] In particular, we found that BT's 20 percent interest in MCI, the second largest U.S. long distance carrier, coupled with its participation on MCI's Board of Directors, could provide BT with the incentive both to discriminate in favor of MCI and to influence the corporate decisionmaking process of MCI. In addition, we noted that BT and MCI had jointly created NEWCO (now called "Concert") which, at least initially, would develop and market enhanced service products, which could require access to the basic services network controlled by BT in the United Kingdom. Finally, we noted that BT would be forced to rely on

would not be "affiliated" within the meaning of our current rules, we concluded that certain factors created incentives for BT to favor MCI.

56. We believe that the competitive implications of the BT/MCI transaction, and other joint ventures developing, underscore the inappropriateness of using control as a threshold level of foreign ownership at which an entry standard would apply for foreign carriers. While we recognize that some U.S. carriers may need additional capital to compete worldwide, and may benefit from foreign carrier investment, we are concerned that if a foreign carrier acquires even a less-than-controlling ownership interest in a U.S. carrier, this also may confer on the foreign carrier the incentive to discriminate in favor of the U.S. carrier. Although in many such instances the incentive to discriminate may be minimal, our safeguards may not always be sufficient to limit the potential for undue discrimination (and other competitive advantages resulting from the exercise of market power) that could occur when a foreign carrier has an ownership interest in a U.S. international carrier.

57. We therefore tentatively conclude that a new affiliation standard is needed that will identify those instances of foreign carrier investment that may require review to see if they implicate the public interest goals of this proceeding. Accordingly, for the purposes of establishing an entry standard, we propose to adopt a definition of affiliation that includes cases where a foreign carrier acquires a direct or indirect ownership interest of a certain minimum percentage level, or a controlling interest at any level, in a U.S. carrier. We seek comment on what that level of interest should be. In reaching a decision, we will look at what level of ownership may give the foreign carrier the incentive to discriminate in favor of the U.S. carrier or to engage in other strategic conduct that might have anticompetitive effects. We also are concerned whether the investment may provide the U.S. carrier with other competitive advantages that flow from the exploitation of the foreign affiliate's market power, such as the ability to market its services exclusively in conjunction with those offered by the foreign carrier. Such exclusive arrangements would be of concern at least until we are assured of effective facilities-based competition on the foreign end. We emphasize, however, that whatever minimum level of ownership we adopt is meant only to be a trigger for our entry review, not a bar to entry. As outlined in this Notice, our review will then take into consideration all factors that might weigh in favor of, or against, allowing entry.

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its 20 percent investment in MCI as a primary source of revenues from the U.S. telecommunications market. BT/MCI Order, 9 FCC Rcd at 3967, para. 36.

58. An interest of five percent, as suggested by AT&T, has been found by the Commission to be an appropriate standard of ownership affiliation in other important regulatory areas such as the Telephone Company-Cable Television Cross-Ownership rules.[45] We find, however, that applying an entry standard and competitive safeguards at a five percent investment might unreasonably limit the ability of U.S. carriers to attract foreign investment, and impose unnecessary administrative burdens on potential entrants. We believe that any residual concerns about potential anticompetitive effects at this level of investment can be adequately dealt with through our standard nondiscrimination safeguards that we apply to all U.S. international carriers and through the enforcement process if necessary.

59. A greater than ten percent ownership interest in a U.S. carrier by a foreign carrier may warrant our scrutiny. Analogous precedent from orders issued under the terms of the AT&T Consent Decree and from the Securities and Exchange Commission ("SEC") supports the reasonableness of a ten percent cap. In a blanket waiver granted by the U.S. District Court in United States v. Western Electric Company (AT&T Consent Decree), the Court, with support of the DOJ, permitted the Bell Operating Companies to acquire up to ten percent of foreign telephone companies, subject to certain nondiscrimination conditions. Section 16(a) of the Securities Exchange Act of 1934, as amended ("the Exchange Act"), also is instructive. Section 16(a) provides that an owner of greater than ten percent of the publicly-traded equity securities (other than exempt securities) of a publicly-held company must file periodic ownership reports with the SEC. This level of ownership is thought to give the security holder the position of an insider and the ability to influence the affairs of the company.

60. Alternatively, we request comment on whether a greater than 25 percent ownership interest should be considered affiliation under our rules. This level would be consistent with the Section 310(b)(4) of the Communications Act benchmark for indirect foreign investment in radio facilities in the United States. A greater than twenty-five percent investment would likely be a level of ownership that would give a foreign carrier a large enough stake to have an incentive to discriminate in favor of its U.S. affiliate. However, we are concerned that a 25 percent level could be perceived by U.S. carriers as so high that it would discourage procompetitive foreign investment.

61. We propose that, in addition to a controlling interest

[45] See Telephone Company-Cable Television Cross-Ownership rules, Section 63.54 - 63.58.

at any level,[46] investment by a foreign carrier in a U.S. international common carrier over a specified threshold will be subject to the entry standard discussed in Section III.B.1, supra. We request comment on whether that threshold level should be set at greater than ten percent, 25 percent, or some other level of capital stock.[47] If a foreign carrier controls a U.S. carrier, or invests more than the specified threshold level in the U.S. carrier, the foreign carrier would be considered affiliated with the U.S. carrier. The affiliated U.S. carrier would then be subject to the entry standard proposed in Section III.B.1. We also request comment on how we should apply our effective market access test in situations where more than one foreign carrier or a foreign carrier consortium has ownership interests in a U.S. carrier.

62. We propose not to include in our definition of affiliation non-equity business relationships between carriers (e.g., where a U.S. carrier is involved in a joint venture with a foreign carrier to manufacture switching equipment). While such relationships between carriers can also provide them with the incentive to favor one another in the exchange of basic services, we tentatively conclude that such incentives are relatively attenuated compared with those that are present with ownership interests. We seek comment on this conclusion.

63. We also tentatively conclude that no foreign carrier entry regulation is required for co-marketing arrangements, such as AT&T's WorldPartners Company, provided they are, both in theory and in practice, nonexclusive[48] (e.g., they do not give the

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[46] We propose to assess control based on Commission precedent under Sections 310(d) and 214(a) of the Act. See International Services, 7 FCC Rcd at 7333, para. 13, n.28.

[47] Our assessment of "capital stock" ownership will be done under the standards developed in Commission case law for determining such ownership.

[48] The nonexclusivity requirement would apply at least until we are assured of effective facilities-based competition on the foreign end. This requirement is grounded in antitrust concerns. Normally, cooperative arrangements between firms in "vertical" situations -- where one firm passes on a service, such as a phone call that originated in a foreign country, to a firm that completes it, such as a telecommunications company in the United States -- create efficiencies and are consistent with antitrust principles. When the upstream company is a monopoly or has "market power," however, the potential exists for discrimination and skewing of competition in the "downstream" market (calls terminating in the United States in the above hypothetical). See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263,